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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH RAFAEL HERNANDEZ,

Defendant and Appellant.

B173936

(Los Angeles County  
Super. Ct. No. BA254293)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephen A. Marcus, Judge. Affirmed.

Leslie G. McMurray, under appointment by the Court of Appeal, and Law Offices of Leslie G. McMurray for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Deborah J. Chuang and Michael R. Johnsen, Deputy Attorneys General, for Plaintiff and Respondent.

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Joseph Hernandez appeals from the judgment entered following a jury trial in which he was convicted of robbery and a bifurcated court trial in which he was found to have sustained prior felony convictions, including one under the Three Strikes law. He contends that hearsay statements were improperly admitted into evidence and that the trial court abused its discretion in refusing to dismiss his strike conviction. We affirm.

### **BACKGROUND**

Around 12:30 a.m. on September 21, 2003, Matthew Mangini and Wendy Hsu were in their car at one of the drive-through automatic teller machines of a bank in downtown Los Angeles. Mangini was sitting in the driver's seat making a deposit when a pickup truck pulled up behind his car. A man got out of the passenger's seat of the truck and started pressing the keys on the machine. When Mangini told the man to use a different machine, the man, holding his hand in his pocket, stated that he had a gun, wanted money, and would shoot Mangini. The man tried to grab Mangini's wallet and Mangini resisted, throwing a deposit envelope containing \$900 cash onto the passenger side floor mat. The man then walked to the other side of Mangini's car, opened the passenger's door (Hsu had since gotten out of the car), took the envelope, and returned to the pickup truck and got inside.

Meanwhile, Hsu went over to the pickup truck and opened the driver's door. Defendant (whom Hsu later identified in a photographic lineup) was sitting in the driver's seat, smoking marijuana. Hsu tried to take the keys to the truck, but defendant pushed her away. Defendant then drove away, with the man who had taken the envelope as his passenger.

Mangini and Hsu gave chase. While following the truck, Mangini used his cell phone to call 911 and report the robbery. During the call, he, with Hsu's assistance, described the perpetrators and their truck, including its license number. (A tape recording of the call, on which both Mangini's and Hsu's voices could be heard, was played for the jury.) Mangini ultimately lost sight of the truck. Defendant was apprehended by the police a few days later.

Testifying in his own behalf, defendant claimed that he was in his truck using drugs when a man he did not know walked up and offered him drugs in exchange for a ride to the bank. Defendant agreed, and as he waited for the man at the bank, Hsu surprised him by opening the door. The man then got back into the truck, pointed a gun at defendant, and told him to drive away. Defendant did so, and after getting away from Mangini and Hsu, the man got out of the car and defendant went home. Defendant further testified that, in giving a post-arrest statement to the police, he did not say he had been threatened because he did not want to be a “snitch.”

## **DISCUSSION**

### **1. Hearsay Statements**

In a proceeding under Evidence Code section 402, the trial court ruled that certain of Mangini’s and Hsu’s statements on the 911 tape came within the spontaneous declaration exception to the hearsay rule of Evidence Code section 1240. Defendant contends that this ruling was in error and further asserts that the entire tape should have been excluded under Evidence Code section 352. We disagree.

Testifying at the Evidence Code section 402 hearing, Mangini stated that he made the 911 call about 10 minutes after the robbery and that, while speaking with the 911 operator, he was “scared” and was “definitely excited.” Defendant argued that there was no spontaneous declaration because Mangini’s tone of voice was calm and some of the information he gave was a repetition of what Hsu had told him. The trial court rejected defendant’s argument, reasoning that the statements were made while Mangini and Hsu were under the stress caused by both the robbery and the ensuing chase. The court also stated that it had listened to the 911 tape “and it appeared to me that the person was talking in an excited manner. They were showing a certain amount of adrenaline as they described what was happening, describing the chasing of this car and as they described the fact that the people might come back towards them.”

“‘To render [statements] admissible [under the spontaneous declaration exception to the hearsay rule] it is required that (1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and

unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it.’ [Citations.]” (*People v. Poggi* (1988) 45 Cal.3d 306, 318.) “‘The crucial element in determining whether a declaration is sufficiently reliable to be admissible under this exception to the hearsay rule is . . . the mental state of the speaker. The nature of the utterance—how long it was made after the startling incident and whether the speaker blurted it out, for example—may be important, but solely as an indicator of the mental state of the declarant.’ [Citation.]” (*People v. Raley* (1992) 2 Cal.4th 870, 892–893.) The decision whether to admit a statement as a spontaneous declaration is reviewed for abuse of discretion. (*People v. Phillips* (2000) 22 Cal.4th 226, 236.)

Citing *People v. Jones* (1984) 155 Cal.App.3d 653, defendant asserts that the statements were not spontaneous because, in chasing after defendant, Mangini and Hsu were employing a strategy consistent with a calculated thought process. But the evidence that defendant cites in support of this argument is based on testimony of Hsu that was elicited after the court had ruled the 911 tape admissible, and defendant did not renew his objection when Hsu testified. In any event, we have listened to the 911 tape and can well understand why the trial court stated that Mangini and Hsu “were showing a certain amount of adrenaline.” That Mangini’s and Hsu’s statements were made while they were chasing defendant does not detract from the trial court’s implied finding that the statements were made while nervous excitement still dominated Mangini’s and Hsu’s mental states and their reflective powers were still in abeyance. The trial court did not abuse its discretion in ruling the statements admissible under the spontaneous declaration exception to the hearsay rule.<sup>1</sup>

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<sup>1</sup> Nor did the ruling violate *Crawford v. Washington* (2004) 541 U.S. \_\_\_\_ [124 S.Ct. 1354]. (See *People v. Corella* (2004) 122 Cal.App.4th 461, 467–469.)

We also disagree with defendant's assertion of Evidence Code section 352 error. "Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. [Citation.]" (*People v. Rodriguez* (1994) 8 Cal.4th 1060, 1124.) "The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging." [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 320.)

The tape of the 911 call was probative in showing that, immediately after the robbery, Mangini and Hsu were able to describe the perpetrators and to give the license number of the vehicle in which the perpetrators had fled. And there was nothing in the tape that would uniquely tend to evoke an emotional bias against defendant, who was being tried as the getaway driver in an apparently armed robbery where a victim had been threatened with being shot. Accordingly, defendant's contention must be rejected.

## **2. *Romero*<sup>2</sup> Motion**

Defendant was born in 1962. His adult criminal history started in 1983 and includes such offenses as marijuana sales, possession of cocaine for sale, armed robbery, and vehicle theft. The robbery, for which he was convicted in 1987, was found to constitute a "strike" under the Three Strikes law, thereby subjecting defendant to a doubling of his prison term for the current offense.

At sentencing, defendant asked that the strike finding be dismissed under *Romero*, arguing that it was remote and his participation in the current offense was minimal. He further claimed that he personally never did anything violent in the robbery incident.<sup>3</sup>

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<sup>2</sup> *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

<sup>3</sup> The incident was described in the probation report as follows: "The victim[] was a pizza delivery man. On the indicated date and time, he responded to the vicinity of (footnote continued on next page)

Defendant acknowledged that he had a drug problem, but asserted that he did his best to provide for his children. The court concluded that defendant was not outside the spirit of the Three Strikes law, reasoning that defendant's criminal record was significant both before and after the strike and included parole violations, and that the current offense involved a car chase. The court rejected the argument that drug use should be considered a mitigating factor, but did state that, rather than imposing a high term for the current offense as it was originally thinking, the middle term would be imposed instead.

Contrary to defendant's assertion on appeal, there was no abuse of discretion under *Romero*. (See *People v. Carmony* (2004) 33 Cal.4th 367 [*Romero* motions reviewed under the deferential abuse of discretion standard].) To gain reversal under *Romero*, the defendant must "clearly show that the [trial court's] sentencing decision was irrational or arbitrary." (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977.) It is not enough to show that reasonable people might disagree about whether to strike a prior conviction. (*Id.* at p. 978.) Nor is it enough to show that the trial court did not specifically address all of the relevant factors when discussing a defendant's request to strike a prior conviction, because "[t]he court is presumed to have considered all of the relevant factors in the absence of an affirmative record to the contrary." (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.)

The relevant factors a court must consider are "whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.) Here, the record

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(footnote continued from previous page)

19823 S. Harlan to deliver a six pack of Budweiser beer and pizza. Upon arriving at the location, the victim was approached by the defendant and the codefendant. They used a knife and demanded the pizza and the beer, all worth \$30."

demonstrates that the trial court was aware it had the power to dismiss defendant's strike conviction and that it considered relevant factors in that regard. Accordingly, defendant has failed to demonstrate that the trial court abused its discretion in denying his *Romero* motion.

**DISPOSITION**

The judgment is affirmed.

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MALLANO, Acting P. J.

I concur:

SUZUKAWA, J.\*

I concur in the judgment only.

VOGEL, J.

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.